# STATE OF MICHIGAN

# COURT OF APPEALS

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UNITED INDUSTRIAL ENGINEERING CORPORATION,

Plaintiff/Counter-Defendant/Third-Party Defendant-Appellant,

v

RONALD FLUTY and FLORENCE FLUTY,

Defendants/Counter-Plaintiffs/Third-Party Plaintiffs-Appellees,

and

JAMIE D. GRIFFIN and FRANCES R. GRIFFIN,

Counter-Defendants/Third-Party Defendants.

UNPUBLISHED
September 19, 2006

No. 260034
Van Buren Circuit Court
LC No. 04-520850-AA

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UNITED INDUSTRIAL ENGINEERING CORPORATION,

Plaintiff/Counter-Defendant/Third-Party Defendant,

v

RONALD FLUTY and FLORENCE FLUTY,

Defendants/Counter-Plaintiffs/Third-Party Plaintiffs-Appellees,

and

JAMIE D. GRIFFIN and FRANCES R. GRIFFIN,

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Counter-Defendants/Third-Party
Defendants-Appellants.

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Before: Sawyer, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Plaintiff United Industrial Engineering Corporation (UIE) appeals as of right the circuit court order affirming an arbitration award. Counter-defendants Jamie D. Griffin and Frances R. Griffin (the Griffins) appeal as of right the circuit court order denying their motion for summary disposition pursuant to MCR 2.116(C)(7) and granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants Ronald Fluty and Florence Fluty (the Flutys) on their third-party claim. We affirm.

UIE contracted to buy Scrap Tech Manufacturing and Engineering Company from the Flutys. Jamie Griffin was the sole shareholder of UIE. In exchange for $339,000, to be paid in five yearly installment payments, the Flutys agreed not to compete with UIE or Scrap Tech. The Griffins personally guaranteed the $339,000. When UIE failed to make the yearly installment payments, the Flutys filed a demand for arbitration against UIE. The Flutys subsequently amended their demand to include a claim against the Griffins. A three-member arbitration panel ordered UIE to pay the Flutys $221,983.51.

UIE initiated the present case by filing a motion to vacate or modify the arbitration award. UIE asserted that the arbitration panel exceeded their authority by awarding money to the Flutys for abandoned claims. In response, the Flutys filed a counter-complaint against UIE and requested the trial court to confirm the arbitration award. The Flutys also filed a third-party complaint against the Griffins and requested the trial court to enter judgment in the amount of $221,983.51 against the Griffins based on the unconditional guaranty because more than 30 days had passed since the date of the arbitration award and UIE had failed to satisfy the award. The Griffins moved to dismiss the Flutys' third-party claim on the ground that it was barred by the doctrine of res judicata. The trial court affirmed the arbitration award against UIE. In addition, the trial court denied the Griffins' motion to dismiss and granted summary disposition to the Flutys pursuant to MCR 2.116(C)(10) and (I)(2).

UIE claims on appeal that the trial court erred in not vacating or modifying the arbitration award. Specifically, UIE argues that the arbitration panel could not have awarded the Flutys more than $210,489.17 because that was the amount remaining due after monies paid at closing and certain offsets[1] were deducted from the amount originally owed. We review a trial court's decision on a motion to enforce, vacate, or modify an arbitration award de novo. *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 554; 682 NW2d 542 (2004).

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[1] $60,000 was paid at closing, and offsets were made for the ALCO litigation and property taxes.

In reviewing an arbitration award, a trial court has three options: (1) confirm the award; (2) vacate the award; or (3) modify the award. MCR 3.602(I), (J), (K); *Konal v Forlini*, 235 Mich App 69, 75; 596 NW2d 630 (1999). A trial court may vacate the award if "the arbitrator exceeded his or her powers." MCR 3.602(J)(1)(c). Arbitrators exceed their powers when they "act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law." *Saveski, supra* at 554, quoting *DAIIE v Gavin*, 416 Mich 407, 434; 331 NW2d 418 (1982). A trial court may modify the award if "there is an evident miscalculation of figures" or "the arbitrator has awarded on a matter not submitted to the arbitrator." MCR 3.602(K)(1)(a), (b). However, any error or miscalculation must be clearly apparent on the face of the arbitration award. *Saveski, supra* at 555; *Konal, supra* at 74.

Even assuming that $210,489.17 is the correct amount that UIE owed under the non-competition agreement after the $60,000 it paid at closing and the offsets to which it was entitled are subtracted from the original $339,000 it owed, a clearly apparent mistake on the face of the arbitration award is not evident. First, § 6 of the non-competition agreement provided that interest would accrue on all overdue principal at a rate of seven percent. Pursuant to this provision, the Flutys requested $35,927.69 in interest. Accordingly, the amount awarded by the arbitration panel was squarely within the amount advocated by UIE plus the interest requested by the Flutys. Second, paragraph 1.2(b) of the stock acquisition agreement allowed the Flutys to take a net worth overage if the net worth of Scrap Tech declined between May 31, 1999, and January 18, 2000. Accordingly, the Flutys requested the arbitration panel to award $24,820.89 in a net worth overage. While UIE contested this amount, it acknowledged that Scrap Tech's net worth declined $19,197.41. Thus, the amount awarded by the arbitration panel was also squarely within the amount advocated by UIE plus the decline in Scrap Tech's net worth. Accordingly, there is no clearly apparent error on the face of the arbitration award. The trial court did not err in affirming the arbitration award.

The Griffins argue on appeal that the trial court erred in holding that the doctrine of res judicata did not bar the Flutys' third-party claim against them. We review a trial court's order on a motion for summary disposition de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). Summary disposition is proper under MCR 2.116(C)(7) if "[t]he claim is barred because of . . . prior judgment . . . ." MCR 2.116(C)(7). A motion brought pursuant to MCR 2.116(C)(7) requires consideration of all documentary evidence presented by the parties. *Herman v City of Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). If it appears "that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party. MCR 2.116(I)(2). Summary disposition is proper under MCR 2.116(C)(10) if the affidavits and documentary evidence presented, viewed in the light most favorable to the non-moving party, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Furthermore, whether res judicata bars a claim is a question of law that this Court reviews de novo. *Shuler v Michigan Physicians Mut Liability Co*, 260 Mich App 492, 510; 679 NW2d 106 (2004).

An arbitration award is res judicata where the parties agreed to submit the issues to arbitration. *Hopkins v City of Midland*, 158 Mich App 361, 370; 404 NW2d 744 (1987). The doctrine of res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to those essential to a prior action. *Chestonia Twp v*

*Star Twp*, 266 Mich App 423, 429; 702 NW2d 631 (2005). Res judicata will only apply if: (1) the prior action was decided on the merits; (2) the decree in the prior action was a final decision; (3) the matter contested in the second case was or could have been resolved in the first; and (4) both actions involved the same parties or their privies. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 10; 672 NW2d 351 (2003). Michigan courts have broadly defined res judicata "to bar litigation in the second action not only of those claims actually litigated in the first action, but also claims arising out of the same transaction that the parties, exercising reasonable diligence, could have litigated but did not." *Id.* at 11. However, res judicata will not bar a claim if that claim was not ripe at the time the initial complaint was filed. *Id.* at 14-16.

A guarantee is "[a] promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another who is liable in the first instance." Black's Law Dictionary (8th ed). The guarantor's duty to pay or to perform is collateral to the duty of the primary obligor and only arises upon the obligor's failure to pay the debt. *Mortgage & Contract Co v Linenberg*, 260 Mich 142, 146-147; 244 NW 428 (1932); see also *Bandit Industries, Inc v Hobbs Int'l (After Remand)*, 463 Mich 504, 507 n 4; 620 NW2d 531 (2001). Pursuant to the terms of the non-competition agreement, UIE was required to make five yearly installment payments. It is undisputed that UIE made only the first payment. However, UIE had a right to offset its payments. If UIE became liable for any debts that were the responsibility of the Flutys or of Scrap Tech before January 18, 2000, UIE, upon written notice, could deduct from its yearly installment payments the amount of the debt for which it became liable. Thus, UIE's failure to pay all or part of the amounts listed in the non-competition agreement did not automatically trigger the Griffins' duty to pay. There first had to be a finding that UIE took improper offsets or that it did not provide the Flutys with proper notice. This finding did not come until August 5, 2004, when the arbitration panel ordered UIE to pay $221,983.51 to the Flutys. Only when UIE failed to pay the $221,983.51 within 30 days was the Griffins' duty to pay under the unconditional guaranty triggered. Because the Griffins' duty to pay was not triggered at the time the Flutys' filed their demand for arbitration, the Flutys' claim against them was not ripe. Accordingly, the trial court did not err in holding that the doctrine of res judicata did not bar the Flutys' third-party claim against the Griffins. The trial court properly granted summary disposition to the Flutys.

The Griffins also argue that the court erred in granting summary disposition to the Flutys because they guaranteed the obligations of Scrap Tech, not the obligations of UIE. The unconditional guaranty provided that the Griffins would guarantee the payment "of all indebtedness and liabilities of the Borrower." "Borrower" was defined as Scrap Tech. But the trial court's failure to recognize that the Griffins did not guarantee the obligations of UIE does not warrant reversal. First, the Griffins did not assert this argument before the arbitration panel or the trial court. Thus, this issue is not properly preserved for appeal, see *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005), and we deem it waived. Second, by solely relying on the defense of res judicata, the Griffins indicated to the trial court that the Flutys, at one time, had a claim against them based on the personal guaranty. Res judicata only bars subsequent actions that are between the same parties, *Chestonia Twp, supra* at 429, and Scrap Tech was not a party to the arbitration proceedings. Because a party may not seek redress for an error he let pass in the trial court, *People v Buck*, 197 Mich App 404, 425; 496 NW2d 321 (1992), rev'd on other grounds *People v Holcomb*, 444 Mich 853 (1993), the Griffins are not entitled to relief on the basis that they only guaranteed the obligations of Scrap Tech.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell